No. 92-1790

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1992

CONSOLIDATED RAIL CORPORATION,
Petitioner,

vs.

GEORGE R. STOWERS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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REASONS FOR GRANTING THE WRIT OF CERTIORARI

A. The Tasks Performed By Yard Crews At The Harbor Yard Are Part Of The Loading Process.

The thrust of respondent's position is that the Harbor Yard railroad employees who actually work on (*i.e.* ride, operate, handle) the engine and loaded railroad cars are not engaged in "maritime employment" because their "sole function at the dock is to drop off or pull away freight cars", and, as such, they are merely "persons acting as delivery agents from land-based transportational [sic] systems [that] were never intended to be covered . . ." Respondent's Brief in Opposition, p. 13.

In an attempt to buttress this point, respondent quotes the observation of this Court in *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249 (1977), reflecting on the Act's legislative history, that

> . . . employees such as truck drivers, whose responsibility on the waterfront is essentially to pick or deliver or cargo unloaded from or destined for marine transportation are not covered.

Id. at 267.

Respondent's comparison of the yard engineer's job tasks at the Harbor Yard Facility to those of a "truck driver", who merely delivers cargo "on the waterfront," is reality-distorting. The issue presented is whether respondent's job included tasks which are "an integral part of and essential to [the] overall processes [of loading and unloading a vessel.]" *Chesapeake & Ohio Railway Co. v. Schwalb,* 493 US. 40, 47 (1989). Even the Sixth Circuit majority opinion recognized that "workers

performing even one integral part of the loading or unloading process are covered by LHWCA." *Stowers*, Appendix 6, *citing to P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, at 82 (1979).

Respondent's job tasks are hardly analogous to the "truck driver" example cited by respondent. The overland transportation of coal *ends* at the Harbor Yard when the coal-filled railroad cars are dropped off at the yard *by the over-the-road crews.* The "yard engineer" and his crew then have the responsibility of assembling the standing cars, moving them to the dockside dumper and physically spotting or pushing each car one at a time into the mechanical dumper, which then dumps the car's contents. This is not regular over-the-road transportation. It is the handling of bulk cargo at the dock as part of the process of loading a vessel. The yard engineer's task at the dumper is clearly "an integral part of" the loading process. The respondent himself conceded on deposition that the loading process would cease and the dumper become "plugged" if he did not do his job.[1]

The undisputed record is that yard crews at the Harbor Yard are responsible at the dockside mechanical dumper for operating a component part of the loading

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[1] *See*, Petition at p. 9, App. A69-A70. Respondent's Brief in Opposition ignores this crucial and undisputed fact of record. In addition, respondent attempts to dispute the record reflected by the majority opinion itself—that yard crews at the Harbor Yard are responsible for "lock[ing] the coal-filled cars into [a] mechanical 'dumper.' " *Stowers*, Appendix 2. Respondent asserts this was simply a mistake of "confusing syntax" in the deposition testimony of train master Englund. There is no confusion. Indeed, respondent fails to point out that train master Englund confirmed in his deposition that the yard crews, including yard engineers, are often called upon to lock the coal-filled cars into the mechanical dumper.

(Footnote continued on following page.)

process—coal-filled rail cars which the yard crew assemble, move, spot and push into and then lock onto the mechanical dumper, which are then removed from the dumper by the yard crew after being emptied so that another car can be loaded and emptied. The issue is not whether the yard crew is actively engaged in the limited task of actually overturning the individual cars, but whether their job tasks constitute under *P.C. Pfeiffer* and *Schwalb* "some portion of that activity [that] is as much an integral part of the process of loading or unloading a ship . . . as a person who participates in the entire process." 444 U.S. at 82-83.

The Sixth Circuit's holding is, therefore, a departure from this Court's established analytical framework and rulings.

(Footnote continued from preceding page.)

> QUESTION: Does each of those cars then have to be moved through the dumper? ANSWER: Yes. The dumper only accepts one car at a time.
>
> QUESTION: What's the method by which the cars are moved in order to get them spotted next to the dumper? ANSWER: Well, there's two methods. The first one is with a mechanical arm which cuts the car—individually cuts the car away from the drag and pushes it into the dumper.
>
> QUESTION: That is strictly coal dock, right? ANSWER: Yes. The other way, when they have one of their numerous failures over there, we have yard crews actually shove the cars to the dumper one at a time. The crew does the dumping work and we had a period of time here back in the spring when we dumped with crews for almost 2 months.
>
> QUESTION: You mean your crew, in other words, would move the car through because the mechanical arm wasn't working? ANSWER: Yes, my crew did everything, they cut the cars, they spotted them on the cradle to be dumped and then they kicked them of. of there.

Englund Depo. p. 28, Supplemental Appendix A71-A72.

B. The Harbor Yard Facility Meets The "Situs" Requirement And Consolidated Rail Corporation Meets The Maritime "Employer" Status Requirement Under The Act.

Respondent also argues that he was not injured on a maritime "situs" and that petitioner, Consolidated Rail Corporation, is not a maritime "employer" under the Act, 33 U.S.C. §§902(4) and 903(a), respectively.

First, neither of these issues were directly addressed by the Sixth Circuit. Nevertheless, the majority opinion plainly implied that both tests were met in the record. *See,* Petition for Writ of Certiorari, p. 13 at footnote 5 and dissent of Judge Brown, 985 F.2d at 298.

In any event, it is clear that the record below satisfied both the "situs" and "employer" status requirements for coverage under the LWHCA. First, the Harbor Yard is a "marine railway" under 33 U.S.C. §903(a). Respondent's opposing brief wrongly equates the term "marine railway" under the 1972 Amendments with a "dry dock." This is plainly mistaken inasmuch as both sections 902(4) and 903(a) refer separately to a "marine railway" and a "dry dock." The tracks at the Harbor Yard clearly meet the "situs" test as a "marine railway." A "marine railway" has a broader meaning under the 1972 Amendments than a "dry dock." *See e.g., Merril v. Chicago & Illinois Midland Railway Co.,* 751 F. Supp. 770, 777-78 (C.D. Ill. 1990).

Second, the Section 903(a) "situs" requirement also includes any "other adjoining area customarily used by an employer in loading, unloading . . . a vessel." The tracks leading to and away from the dumper, including the "backtrack" area, where damaged cars from the loading process are "bad ordered," unmistakably meet

this separate "situs" test. The sole function of the Harbor Yard facility is to serve the loading and unloading of vessels operating on the Great Lakes. It is, therefore, an "adjoining area customarily used by an employer in loading [and] unloading . . . a vessel" under Section 902(a).

It follows from the above that Conrail's employment of a Yard Engineer engaged in "maritime employment" under Section 902(3) at a maritime "situs" under Section 903(a), qualifies Conrail as a maritime "employer" within the meaning of U.S.C. §902(4). This was clearly recognized by the Sixth Circuit majority opinion and dissent. Respondent's contention to the contrary is wholly insubstantial.

For all of the above reasons, it is respectfully requested that this Court grant the Writ of Certiorari to the Sixth Circuit Court of Appeals.

Respectfully submitted,

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[1] **SUPPLEMENTAL APPENDIX**

Case No. 1:91 CV 1022

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

GEORGE R. STOWERS,
Plaintiff,

vs.

CONSOLIDATED RAIL CORPORATION,
Defendant.

JUDGE ALDRICH

Deposition of CARL ENGLUND, taken as if upon cross-examination before Linda A. Astuto, a Registered Professional Reporter and Notary Public within and for the State of Ohio, at the offices of Nurenberg, Plevin, Heller & McCarthy, 1st Floor Standard Building, Cleveland, Ohio, at 10:00 a.m. on Monday, December 9, 1991, pursuant to notice and/or stipulations of counsel, on behalf of the Plaintiff in this cause.

* * * * *

[28] A. Once again it depends on what they've asked for.

Q. Does each of those cars then have to be moved through the dumper? A. Yes. The dumper only accepts one car at a time.

Q. What's the method by which the cars are moved in order to get them spotted next to the dumper? A. Well, there's two methods. The first one is with the mechanical arm which cuts the car—individually cuts the car away from the drag and pushes it into the dumper.

Q. That is strictly coal dock, right? A. Yes. The other way, when they have one of their numerous failures over there, we have yard crews actually shove the cars onto the dumper one at a time. The crew does the dumping work and we had a period of time here back in the spring where we dumped with crews for almost two months.

Q. You mean your crew, in other words, would move the car through because the mechanical arm wasn't working? A. Yes. My crew did everything. They cut the cars, they spotted them on the cradle to be dumped and then they kicked them off of there.

Q. Still the dumping would be done by the coal dock?

* * * * *